Supreme Court of the United States

No. 14-556

JAMES OBERGEFELL, *et al.*, and BRITTANI HENRY, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, Director,
Ohio Department of Health, *et al.*,

Respondents.

(*Caption continued on inside cover*)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* CARLOS A. BALL, DISTINGUISHED PROFESSOR OF LAW, RUTGERS UNIVERSITY; ALFRED BROPHY, JUDGE JOHN J. PARKER DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW; JULIE NOVKOV, PROFESSOR AND CHAIR, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY AT ALBANY, SUNY; SCOTT SKINNER-THOMPSON, ACTING ASSISTANT PROFESSOR, NYU SCHOOL OF LAW; RICHARD F. STORROW, PROFESSOR OF LAW, CITY UNIVERSITY OF NEW YORK IN SUPPORT OF PETITIONERS

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Petitioners,

—v.—

BILL HASLAM, Governor of Tennessee, *et al.*,

Respondents.

No. 14-571

APRIL DEBOER, *et al.*,

Petitioners,

—v.—

RICK SNYDER, Governor of Michigan, *et al.*,

Respondents.

No. 14-574

GREGORY BOURKE, *et al.*, and TIMOTHY LOVE, *et al.*,

Petitioners,

—v.—

STEVE BESHEAR, Governor of Kentucky, *et al.*,

Respondents.

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An Act for Suppressing Outlying Slaves, in The Statutes at Large; Being a Collection of All the Laws of Virginia Vol. 3, pp. 86-87 (William Waller Hening ed., 1823) 4

Carlos A. Ball, *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law* (2014)..... 24

Christopher Tiedeman, *A Treatise on the Limitations of the Police Power in the United States 536* (1886) 14

PAGE(S)

David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood & Marriage Are Indispensable For The Good Of Children & Society* 146 (1996) 23

Edward J. Larson, *Sex, Race, and Science: Eugenics in the Deep South* 22 (1995)... 15

Edward W. Spencer, *Some Phases of Marriage Law and Legislation from a Sanitary and Eugenic Standpoint,* 25 Yale L. J. 58, 64 (1915)..... 15

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Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim, *and the Supreme Court,* 42 Am. J. Legal Hist. 119, 124 (1998) 8

Harry D. Krause, *Equal Protection for the Illegitimate* 65 Mich. L. Rev. 477 (1967) 20

J.P. Chamberlain, *Eugenics and Limitations of Marriage* 9 A.B.A. J. 429, 429 (1923) 15

John Witte, Jr., *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* 139 (2009)..... 18

PAGE(S)

Kingsley Davis, Illegitimacy and the Social Structure 45 Am. J. Soc. 215, 219 (1939) 19, 20

Kristin Anderson Moore et al., *Child Trends, Marriage From a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?* 1–2 (2002), *available at* http://www.childtrends.org/files/MarriageRB602.pdf 23

Madison Grant, *The Passing of The Great Race: Or the Racial Basis of European History* 47 (1916)..... 8

Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family* 2012 Brit. J. Am. Leg. Stud. 411)..... 24

Michael Grossberg, *Governing The Hearth: Law and the Family in Nineteenth-Century America* 197–98 (1988) 18

Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony* 26 Am. J. Legal Hist. 197, 219 (1982) 13, 14

Negro Womens Children to Serve According to the Condition of the Mother, in The Statutes at Large; Being a Collection of All the Laws of Virginia Vol. 2, p. 170 (William Waller Hening ed., 1823) 4

PAGE(S)

Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 115–23 (2009) 7

Percy Gamble Kammerer, *The Unmarried Mother: A Study of Five Hundred Cases* (1918) 19

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Thomas A. Foster, *Sex and the Eighteenth-Century Man: Massachusetts and the History of Sexuality in America* 129 (2007) 5

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INTEREST OF *AMICI CURIAE*

Amici[1] consist of a group of scholars who have taught and written on the history of family law and policy. This brief aims to provide the Court with an explanation of the ways in which purportedly scientific evidence and claims have been used historically to justify discriminatory policies in family law. The *amici* scholars[2] are Carlos A. Ball, Distinguished Professor of Law, Rutgers University; Alfred Brophy, Judge John J. Parker Distinguished Professor of Law, University of North Carolina School of Law; Julie Novkov, Professor and Chair, Department of Political Science, University at Albany, SUNY; Scott Skinner-Thompson, Acting Assistant Professor, NYU School of Law; Richard F. Storrow, Professor of Law, City University of New York.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from Respondents consenting to the filing of *amicus curiae* briefs in support of either party or of neither party have been filed with the Clerk of the Court. *Amici* have received written consent to the filing of this brief from each Petitioner.

[2] *Amici* appear in their individual capacities; institutional affiliations are listed for identification purposes only.

SUMMARY OF ARGUMENT

The history of past class-based marital exclusions has clear implications for the present appeal. That history teaches us that the empirical-sounding, pseudoscientific assertions of one era's jurists and counsel often are revealed as invidious and indefensible discrimination over time. Such empirical-sounding, pseudoscientific assertions have been advanced in underlying briefs, including *amici* briefs filed in the U.S. Court of Appeals for the Sixth Circuit by marriage equality opponents, which argue that denying marriage to same-sex couples promotes the well-being of society and children. These briefs, and proponents of similar arguments, describe households headed by married heterosexuals who are biologically related to their children as the "optimal" setting for rearing children. They argue that other family structures—including ones led by same-sex couples—undermine the well-being of society and children.

How class-based marital exclusions were defended in the past—and how those justifications later were exposed as false—should influence this Court's assessment of similar defenses and justifications here. Exclusionary policies aimed at denying entire classes of individuals the opportunity to marry have been rare in American history. Most have involved attempts to rely on supposedly "scientific" evidence to justify invidious discrimination by contending that certain family structures were bad for society and children. These efforts included laws (1) prohibiting couples of different races from marrying; (2) restricting people with mental

disabilities from marrying; and (3) denying rights and benefits to nonmarital children.

Proponents of these historical class-based marital exclusions defended the use of state authority to define marriage and its accompanying benefits to promote what they believed were socially optimal goals in matters related to procreation, family formation, and child welfare. Supporters frequently justified these laws with pseudoscientific claims about the well-being of society and children, which they claimed were self-evidently true. For instance, the Georgia Supreme Court upheld Georgia's antimiscegenation statute based on the Court's "daily observation" that children of mixed-race couples are "sickly and inferior." In upholding Connecticut's law banning marriage by disabled persons, the Connecticut Supreme Court relied on pseudoscientific claims it described as "common knowledge" subject to judicial notice.

It is now clear that these earlier defenses of class-based marital exclusions, though they had a veneer of empiricism, were grounded in deeply held prejudices and biases. The passage of time has shown that these earlier justifications were constitutionally impermissible, morally unacceptable, and empirically indefensible. This Court should reject arguments attempting similar justifications for denying same-sex couples the opportunity to marry.

ARGUMENT

I. ANTIMISCEGENATION LAWS WERE JUSTIFIED BY PSEUDOSCIENTIFIC AND PSEUDOEMPIRICAL CLAIMS ABOUT SOCIAL AND CHILD WELFARE

Virginia implemented the earliest and most comprehensive regulation of interracial relationships in the American colonies. Initially, those efforts focused not on marriage, but on the legal status of interracial children.

Three decades before Virginia banned marriage across color lines, it addressed the birth of a growing number of interracial children by making the legal status of interracial children dependent on the mothers' status. *Negro Womens Children to Serve According to the Condition of the Mother*, *in* 2 *The Statutes at Large; Being a Collection of All the Laws of Virginia* 170 (William Waller Hening ed., 1823). The statute's purpose was to make sure the law considered the interracial children of female slaves also to be slaves. *See* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967, 1994 n.127 (1989).

Virginia's first statute banning interracial marriages, enacted in 1691, reflected this focus on children. That law, whose progeny this Court struck down almost three hundred years later in *Loving v. Virginia*, 388 U.S. 1 (1967), was enacted to "prevent . . . that abominable mixture and spurious issue which hereafter may encrease in this dominion . . . ." *An Act for Suppressing Outlying Slaves*, *in* 3 *The Statutes at Large; Being*

a Collection of All the Laws of Virginia 86-87 (William Waller Hening ed., 1823). The law's language shows the legislators' motivation in condemning marriages that crossed racial lines was rooted in an objection to the offspring of interracial relationships.

Virginia was not alone in enacting anti-miscegenation laws. Other colonies, both in the south and the north, did the same, several using the statutory model adopted by Virginia. For example, Massachusetts's antimiscegenation law of 1705 called for the prevention of "a Spurious and Mixt Issue." Thomas A. Foster, *Sex and the Eighteenth-Century Man: Massachusetts and the History of Sexuality in America* 129 (2007).

The validity of these laws was not challenged in the courts until after the Civil War, the enactment of the Civil Rights Act of 1866, and the adoption of the Fourteenth Amendment. Courts in the second half of the nineteenth century consistently upheld antimiscegenation laws by contending that marriage was a question of societal well-being, not individual rights implicating the U.S. Constitution. *See, e.g.*, *Dodson v. State*, 31 S.W. 977 (Ark. 1895); *State v. Gibson*, 36 Ind. 389 (1871); *State v. Hairston*, 63 N.C. 451 (1869). Some state high courts also held that the Fourteenth Amendment's equality protections and the Civil Rights Act of 1866 were not implicated by marriage restrictions that applied equally to whites and blacks. *See, e.g.*, *Ellis v. State*, 42 Ala. 525 (1868); *Green v. State*, 58 Ala. 190 (1877).

These rulings reflected a growing pseudo-scientific and eugenic understanding of antimiscegenation laws. The Kentucky Court of

Appeals in 1867 worried that the legalization of marriages by mixed-race couples would lead to the "deteriorat[ion of] the Caucasian blood." *Bowlin v. Commonwealth*, 65 Ky. 5, 9 (1867). Two years later, the Georgia Supreme Court, in upholding the criminal conviction of a black woman for marrying a white man, proclaimed:

> the amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, *that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.* It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.

Scott v. Georgia, 39 Ga. 321, 324 (1869) (emphasis added). The Tennessee Attorney General expressed a similar view in 1871 when he analogized antimiscegenation laws to ancient "Mosaic laws" that forbade Jews from interbreeding different animals, such as horses with donkeys to create mules. According to the state official, a law against "breeding mulattoes" was not any more problematic since it was also aimed at "prevent[ing] the production of [a] hybrid race." *Lonas v. State*, 50 Tenn. 287, 299 (1871).

The Missouri Supreme Court in 1883 was troubled by the purported inability of biracial individuals to procreate—in its view, a sufficient basis to find antimiscegenation laws constitutional. As the court explained, in a prejudice-driven misunderstanding of biology, "it is . . . a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites." *State v. Jackson*, 80 Mo. 175, 179 (1883).

Since colonial days, many Americans understood interracial procreation to be unnatural. But the views of these postbellum courts and officials reflected new concerns related to supposed reproductive barrenness, hereditary deterioration, and physical and psychological deficiencies of interracial offspring. Arguments to keep marriage within color lines grew to include sociobiological considerations grounded in supposedly empirical claims about procreation and the well-being of children. We now know such claims had no bases in fact and were driven by racist views antithetical to the notion that all Americans are entitled to equal treatment under law.

Defenders of antimiscegenation laws legitimized that ideology by turning to the "science" of eugenics. Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 115–23 (2009). Many proponents of "race regeneration" and avoidance of "race suicide" saw antimiscegenation laws as important tools to promote 'procreative optimality.' *See, e.g.*,

Madison Grant, *The Passing Of The Great Race: Or the Racial Basis of European History* 47, 60 (1916) (contending interracial marriages promoted "race suicide" and insisting "laws against miscegenation must be greatly extended if the higher races are to be maintained."); *see also* Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 Am. J. Legal Hist. 119, 124 (1998) ("American eugenicists generally . . . argued for the scientific defense of civilization through racial purity, using their theories about race mixing to shape public policy.").

Even after eugenics was discredited for its untenable moral positions and unsupportable scientific claims, defenders of antimiscegenation laws invoked eugenics and procreative optimality when defending race-based marital bans in court. For example, in defending the constitutionality of its antimiscegenation law before the California Supreme Court in 1948, *see Perez v. Sharp*, 198 P.2d 17 (Ca. 1948), the State raised eugenic and sociological arguments centered on procreation and child welfare.

In *Perez*, the State first claimed whites were superior to other races and the progeny of racially mixed couples were inferior to the progeny of white couples. According to the State, the marriage ban "prevent[ed] the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians." *Id.* at 23. California also contended the biological data showed "the crossing of widely different races has undesirable biological results" and "the parties who enter into miscegenetic [sic]

marriages have proved generally to be the dregs of both races," making it likely "the offspring of such marriages will turn out to be inferior to both of their parents." Respondent's Supplemental Brief in Opposition to Writ of Mandate at 62, 78, *Perez v. Sharp*, 198 P.2d 17 (Ca. 1948).

Besides relying on racist eugenic claims, California defended its antimiscegenation law on supposedly sociological grounds. The State contended interracial marriages led to greater social tension because most people disapproved of them. *Perez*, 198 P.2d at 25. The State claimed blacks were "socially inferior," and "the progeny of a marriage between a Negro and a Caucasian suffer not only the stigma of such inferiority but the fear of rejection by members of both races." *Id.* at 26. According to the State, antimiscegenation laws promoted child welfare by protecting children from the social inferiority and stigma that accompanied their parents' marriages.

The court in *Perez* rejected the contention that children of interracial unions were defective or deficient. *Id.* at 23–24. That court explained whites' greater societal success resulted not from mental superiority, but from the social advantages of their skin color. *Id.* at 24. The California Supreme Court rejected the State's argument that the stigma suffered by racially mixed children justified the marriage ban, reasoning "the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior." *Id.* at 26. The Court further explained "[t]he effect of race prejudice upon any community is unquestionably

detrimental both to the minority that is singled out for discrimination and to the dominant group that would perpetuate the prejudice. It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension." *Id.* at 25.

The California Supreme Court's opinion invalidating the antimiscegenation law under the federal Constitution rejected the State's purported child-based justifications for that law. But Florida relied on those justifications fifteen years later to defend a statute criminalizing mixed-race cohabitation. *See McLaughlin v. Florida*, 379 U.S. 184 (1964). The State claimed the statute prevented psychological and social harm to children born from interracial relationships. Brief of Appellee, *McLaughlin v. Florida* at 41–42, 379 U.S. 184 (1964). Florida argued that its interest in avoiding such harm justified the enactment of antimiscegenation laws and the interracial cohabitation ban. The State's brief explained:

> it is well known that both the white and the negro race tend to shun the offspring of interracial marriages . . . . The need of offspring to identify with others is a well understood psychological factor in present times. The interracial offspring are not fully accepted by either race. There is therefore a clear psychological handicap problem among interracial offspring.

Id. at 42. According to the State, the "psychological handicaps of children born of negro–white parentage" were enough to uphold the constitutionality of its statute. *Id.* at 44.

Virginia raised the same concerns about procreation and child welfare to defend its antimiscegenation law in *Loving v. Virginia*, 388 U.S. 1 (1967). Its brief to this Court in *Loving* quoted extensively from a book by Albert I. Gordon, a rabbi trained as a sociologist. Albert I. Gordon, *Inter-Marriage: Interfaith, Interracial, Interethnic* (1964). Claiming the marriages of mixed-race couples were more likely to end in divorce than same-race ones, Gordon argued interracial unions should be avoided because they harmed children. Gordon explained

> [p]ersons anticipating cross-marriages, however much in love they may be, have an important obligation to unborn children. It is not enough to say that such children will have to solve their own problems 'when the time comes.' Intermarriage frequently produces major psychological problems that are not readily solvable for the children of the intermarried . . . . [I]t is not likely that the child will come through the maze of road blocks without doing some damage to himself.

Id. at 354 (quoted in Brief of Appellee, *Loving v. Virginia*, U.S. Supreme Court, 388 U.S. 1 (1967), at Appendix B). Gordon added that the children of interracial marriages often were "disturbed, frustrated and unable to believe that they can live normal, happy lives." *Id.* at 370 (quoted in Brief of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967), at Appendix B).

Virginia, in a deeply ironic move, also defended its antimiscegenation law by analogizing the

purported psychological harm to children from the social stigma of mixed-race marriages to the ways segregated schools harmed black children as recognized by this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). By claiming to promote children's best interests, Virginia implausibly relied on this Court's landmark racial equality ruling to defend a law grounded in the perceived racial inferiority of blacks. Brief of Appellee, *Loving v. Virginia* at 35, 388 U.S. 1 (1967).

Finally, Virginia also raised eugenic justifications for its antimiscegenation law. Its brief in *Loving*, quoting a 1959 opinion by the Louisiana Supreme Court, claimed "a state statute which prohibits intermarriage or cohabitation between members of different races . . . falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children." *Id.* (quoting *State v. Brown*, 108 So. 2d 233, 234 (La. 1959)).

In sum, the history of antimiscegenation laws in this country is littered with efforts to defend those laws as beneficial to society because they purportedly advanced the well-being of children. Those efforts were frequently supported by pseudoscientific claims in an effort to give the policies a veneer of empiricism.

To assess the justifications advanced to support the class-based marital exclusion at issue on this appeal, this Court should note that efforts to defend antimiscegenation laws have failed the test of time. Indeed, this Court in *Loving* saw through such efforts. Antimiscegenation laws, this Court

concluded, were patently unconstitutional because—rather than promoting the welfare of society or of children—they were "measures designed to maintain White Supremacy." *Loving*, 388 U.S. at 11 (footnote omitted).

II. LAWS PROHIBITING DISABLED INDIVIDUALS FROM MARRYING WERE JUSTIFIED BY PSEUDOSCIENTIFIC AND PSEUDOEMPIRICAL CLAIMS ABOUT SOCIAL AND CHILD WELFARE

Statutes prohibiting cognitively disabled individuals from marrying were first enacted at the end of the nineteenth century. Supporters defended them by claiming they optimized human reproduction and minimized the chances children would develop physical and psychological deficiencies.

During the first half of the nineteenth century, there was a prevailing understanding that mentally disabled individuals could lead happy and productive lives through treatment and care in specialized institutions (i.e., asylums). Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 Am. J. Legal Hist. 197, 219 (1982). But in the second half of the nineteenth century, the eugenic notion of improving the human race by discouraging procreation among certain classes of individuals took hold among a growing number of policymakers and experts. This drove a shift from treating mental illness to preventing the birth of children with cognitive and other disabilities. *Id.*

One way to achieve this goal was by forcibly sterilizing those deemed "feebleminded." *See generally* Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, The Supreme Court, and* Buck v. Bell (2008). Those who embraced eugenics also came to see marriage bans as a way of avoiding the social costs associated with the birth of mentally disabled children. Michael Grossberg, *Guarding the Altar*, at 219 ("Stringent and well-enforced marriage standards for conjugal fitness became one widely advocated method of intervening in the reproductive process to prevent the birth of feebleminded children."). Put starkly by one constitutional scholar in 1886, "if the blood of either of the parties to a marriage is tainted with insanity there is imminent danger of its transmission to the offspring, and through the procreation of imbecile children the welfare of the state is more or less threatened." *Id.* (quoting Christopher Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* 536 (1886)).

The first law specifically aimed at excluding the so-called feebleminded from marriage was a criminal statute enacted by the Connecticut legislature in 1896. That law prohibited the marriages of epileptics, "imbeciles," and the "feebleminded." Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values*, 81 Colum. L. Rev. 1418, 1432 (1981). The legislation only applied if the female partner was younger than forty-five, making clear its procreative concerns. *See id.* Several states, including Kansas, Michigan, New Jersey, and Ohio, soon adopted similar statutes. Grossberg, *Guarding the Altar*, at 221. Two states, South Dakota and Nebraska,

were even more draconian: they required all mentally disabled people to register with the State and prohibited them from marrying unless one of the wedding partners was infertile. Edward J. Larson, *Sex, Race, and Science: Eugenics in the Deep South* 22 (1995).

As with race-based marital restrictions, supporters of the disability marriage bans tried to legitimate them by pointing to "scientific" claims that were actually expressions of invidious prejudice against the disabled. For instance, a supporter of these bans wrote in the *ABA Journal* in 1923 that they were "based not on historical rules . . . but on scientific facts. [They are] directed against two evils, the bringing into the world of children with hereditary taints and the protection of the public health by preventing the spread of disease through marriage." J.P. Chamberlain, *Eugenics and Limitations of Marriage*, 9 A.B.A. J. 429, 429 (1923).

Many legal commentators in the first decades of the twentieth century agreed that the state possessed an expansive authority to impose marital restrictions to promote the public's safety and health. As one author explained in the *Yale Law Journal* in 1915, marriage is "a matter of general or common right, [and as such] is so firmly bound up with the very life of the state and with its social, moral and economic welfare as to be distinctively and preëminently within the police power." Edward W. Spencer, *Some Phases of Marriage Law and Legislation from a Sanitary and Eugenic Standpoint*, 25 Yale L. J. 58, 64 (1915). This power, the author added, unquestionably permitted the government to legislate for

"the protection of the public or posterity through the prevention of diseased or degenerate offspring." *Id.*

Some courts in the early twentieth century accepted the claims made by supporters of disability marriage bans. For example, the Connecticut Supreme Court, in a 1905 case involving the application of the ban to an epileptic man who attempted to marry, explained "that epilepsy is a disease of a peculiarly serious and revolting character, tending to weaken mental force, and often descending from parent to child, or entailing upon the offspring of the sufferer some other grave form of nervous malady, is a matter of common knowledge, of which courts will take judicial notice." *Gould v. Gould*, 61 A. 604, 604–05 (Conn. 1905). The court concluded the statute's objectives were reasonable because the law applied to "a class [of people] capable of endangering the health of families and adding greatly to the sum of human suffering." *Id.* at 605.

This reasoning, of course, has been entirely repudiated today. Not only does forced sterilization raise constitutional issues, see *Skinner v. Oklahoma*, 316 U.S. 535 (1942), but this Court has made clear that people with disabilities have constitutional and statutory rights that protect them from invidious discrimination. *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (holding the unjustified segregation of the mentally disabled in government facilities violates the American with Disabilities Act); *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448–49 (1985) (holding that treating the disabled on the basis of prejudice and fear violates the Equal Protection Clause). Courts today would

reject the pseudoscientific arguments about the well-being of society and children used in the past by defenders of disability marriage bans.

The disability marriage bans are another example of the rare, but deeply troubling, efforts in American history to deny an entire class of people the opportunity to marry based on pseudoscientific claims about how best to promote family optimality, child welfare, and the social good.

Like the history of race-based marital restrictions, this history should influence the Court's assessment of the arguments advanced to support the class-based marital exclusion at issue here. With passing time, we see what should have been clear when the disability marriage bans were enacted: the effort to prevent cognitively disabled individuals from marrying reflected invidious prejudices and a failure to accept the equal dignity of a class of citizens. The effort was not, as supporters claimed, about promoting the welfare of society and children.

III. LEGAL DISCRIMINATION AGAINST NONMARITAL CHILDREN WAS JUSTIFIED BY PSEUDOSCIENTIFIC AND PSEUDOEMPIRICAL CLAIMS ABOUT SOCIAL AND CHILD WELFARE

Marital laws that have purportedly sought to promote the social good by addressing procreative and child welfare considerations have not been limited to outright bans. Those considerations also played crucial roles in defending laws disadvantaging children born outside marriage.

The American colonies followed English law in distinguishing between children born in wedlock,

who were "legitimate" and could inherit property from their parents, and children born outside marriage, who were "illegitimate" and could not inherit from anyone. Michael Grossberg, *Governing The Hearth: Law and the Family in Nineteenth-Century America* 197–98 (1988). A child born out of wedlock was considered "*filius nullius*," the child and the heir of no one. *Id.* In colonial America, as in England, the parents of "illegitimate" children (mothers, in particular) were subject to punishment, including fines, imprisonment, and even public whippings, for what society deemed their sexual sins. John Witte, Jr., *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* 139 (2009).

The nineteenth century saw legal reforms aimed at reducing the number of so-called illegitimate (hereafter "nonmarital") children and at mitigating some of their legal disabilities. Although English law did not allow for the legitimation of children through the parents' subsequent marriage or the fathers' acknowledgment of paternity, some American states beginning in the early 1800s enacted laws providing one or both avenues to legitimation. Grossberg, *Governing the Hearth* 200–07. The advent of common law marriages and the judicial application of a strong presumption that children of married women were also the children of their husbands further reduced the number of nonmarital children. *Id.* Some states also began allowing nonmarital children to inherit from their mothers (but not their fathers). *Id.*

The push to reform laws affecting nonmarital children stalled, however, during the second half of the nineteenth century. As the legal historian

Michael Grossberg explains, "the post-1850 American obsession with improving family life reinvigorated the use of the law to separate illegitimate from legitimate offspring . . . . The belief that discriminatory laws reinforced legitimate families and deterred spurious birth inhibited [additional] reform efforts." *Id.* at 228–29.

By the turn of the twentieth century, prevailing understandings of "illegitimacy" began to reflect eugenic ideas, in particular the notion that the phenomenon was largely caused by the mental "defective[ness]" and "feeblemindedness" of single mothers. *See, e.g.*, Percy Gamble Kammerer, *The Unmarried Mother: A Study of Five Hundred Cases* (1918); Emma O. Lundberg, *Children of Illegitimate Birth and Measures for Their Protection* (Children's Bureau, U.S. Dep't of Labor, Bureau Publication No. 166, 1926).

Many supporters of treating nonmarital children differently also claimed the discrimination was necessary to promote social welfare and family optimality. The prominent sociologist Kingsley Davis articulated this view in 1939 when he wrote:

> [T]he function of reproduction can be carried out in a socially useful manner only if it is performed in conformity with institutional patterns, because only by means of an institutional system can individuals be organized and taught to cooperate in the performance of this long-range function, and the function be integrated with other social functions. The reproductive or familial institutions constitute the social machinery in terms

> of which the creation of new members is supposed to take place. The birth of children in ways that do not fit into this machinery must necessarily receive the disapproval of society, else the institutional system itself, which depends upon favorable attitudes in individuals, would not be approved or sustained.

Kingsley Davis, *Illegitimacy and the Social Structure*, 45 Am. J. Soc. 215, 219 (1939). Davis and many others defended the unequal legal treatment of nonmarital children as a necessary means to promote what they considered best for society and for children.

Although some states, around the middle of the twentieth century, enacted additional reforms to reduce the number and impact of legal disabilities on nonmarital children (by, for example, permitting them to inherit from both their mothers and fathers), many laws that denied benefits to children born outside of marriage were still on the books by the 1960s. *See generally* Harry D. Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477 (1967). In 1967, this Court agreed to hear a challenge to one of those laws: Louisiana's refusal to allow nonmarital children to sue in tort for the wrongful deaths of their mothers, a right the State provided to marital children. *Levy v. Louisiana*, 391 U.S. 68 (1968).

In its brief to this Court in *Levy*, the State claimed it was appropriate to impose unequal burdens on nonmarital children to achieve its understanding of what constituted family optimality: "superior rights of legitimate offspring are inducements or incentives to parties to contract

marriage, which is preferred by Louisiana as the setting for producing offspring." Brief of Attorney General, State of Louisiana, *Levy v. Louisiana* at 4–5, 391 U.S. 68 (1968).

This Court in *Levy* rejected the State's reasoning, concluding that treating nonmarital children differently was a form of invidious discrimination. *Levy*, 391 U.S. at 71–72. The Court pointed out that those children, when they became adults, had the same legal obligations as everyone else, and yet the State denied them rights and benefits enjoyed by their fellow citizens. Such differential treatment was prohibited by the constitutional mandate requiring equal protection for all. *Id.*

Three years after *Levy*, the constitutionality of another Louisiana statute, one that precluded nonmarital children from inheriting from their fathers if "legitimate" children also claimed an inheritance, reached this Court in *Labine v. Vincent*, 401 U.S. 532 (1971). Louisiana once again argued the differential treatment of nonmarital children was necessary to promote marriage and the nuclear family. Brief of Attorney General for the State of Louisiana at 3, *Labine v. Vincent*, 401 U.S. 532 (1971) (claiming laws that "favor legitimate children over illegitimate children . . . strengthen the idea of a family unit to discourage the promiscuous bearing of children out of wedlock. Whether this is good or bad it seems is a sociological question and not a legal one."). Laws that denied benefits to nonmarital children, the State explained, "are based on the proposition that the family is a critical unit of society." *Id.* at

4. The government added such statutes "encourage marriage and family ties." *Id.*

The year after *Labine*, this Court in *Weber v. Aetna Casualty & Surety Company* addressed the constitutionality of a statute that denied workers' compensation benefits to the nonmarital children of employees. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). In *Weber*, this Court held that whatever interests the government might have in promoting marriage and discouraging the birth of nonmarital children, those interests were not advanced by denying workers' compensation benefits to those children. The Court found it irrational to believe people would "shun illicit relations" because their children might someday be denied access to particular benefits. *Id.* at 173.

After *Weber*, governments ceased defending the differential treatment of nonmarital children based on the asserted need to encourage procreation within marital families and to discourage other family forms. Instead, government defendants focused on narrower justifications for the differential treatment, including the administrative difficulties of establishing paternity outside of marriage and the need to discourage spurious claims for government benefits. *See, e.g.*, *Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (noting that the State has a considerable interest arising from the "peculiar problems of proof" in paternal inheritance cases involving nonmarital children); *Jimenez v. Weinberger*, 417 U.S. 628, 633–34 (1974) (rejecting government defense that denying benefits to nonmarital children of disabled parents born after the onset of disability was justified to prevent spurious claims). Government

defendants had to narrow their justifications for the differential treatment of nonmarital children because this Court grew increasingly skeptical of efforts to deny benefits to people because of the circumstances of their birth. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456 (1988); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973).

IV. OPPONENTS OF MARRIAGES BY SAME-SEX COUPLES CONTINUE TO MAKE PSEUDOSCIENTIFIC AND PSEUDO-EMPIRICAL CLAIMS ABOUT SOCIAL AND CHILD WELFARE

Although efforts to justify exclusionary marital policies with pseudoscientific claims have long been discredited, such efforts are not a thing of the past. Several opponents of marriage equality in the case below adopted precisely this approach. The Catholic Conference of Ohio, for instance, suggested that "a large and growing body of research" shows how children need both a male and a female parent. Brief for the Catholic Conference of Ohio as *Amici Curiae* Supporting Appellants at 9, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-3464). In support of this claim, the marriage equality opponents quoted a 1996 study that did not study families headed by same-sex couples (*id.*; David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood & Marriage Are Indispensable For The Good Of Children & Society* 146 (1996)); a 2002 study whose authors deny that conclusions on marriage equality can be drawn from its findings (*id.*; Kristin Anderson Moore et al., *Child Trends, Marriage From a Child's Perspective: How Does*

Family Structure Affect Children and What Can We Do About It? 1–2 (2002), *available at* http://www.childtrends.org/files/MarriageRB602.pdf); and a 2012 article by a political philosopher concerned with marriage equality in the context of "John Rawls's political liberalism and its ideal of public reason" (*id.*; Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 2012 Brit. J. Am. Leg. Stud. 411)). Marriage equality opponents presented these as exemplars of the "large and growing body of research" on the subject, *id.*, when in fact the research shows the precise opposite of their conclusions. *See generally* Carlos A. Ball, *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law* (2014).

The Michigan Catholic Conference also invoked science to justify banning marital unions by same-sex couples. But its brief cited the same 2002 study on which its Ohio counterparts relied, again contrary to its authors' insistence that the study tells us nothing about outcomes for children of same-sex couples. Brief for Michigan Catholic Conference as *Amici Curiae* Supporting Appellants at 15, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341). The brief further cited a century-old pamphlet titled *Marriage and Divorce*. *Id.* This text—whose primary aim is to warn against the evils of divorce, even in cases of adultery—describes how a "child needs the father's masculine influence, and the mother's feminine influence, always together, the two streams uniting to pour their fructifying influence through the child's life into the life of humanity." *Id.* But the quoted author (an ethicist and religious leader) cites no sources, leaving this

"fructifying influence" no better grounded than a judge's "daily observations" of the supposed deficiencies of interracial children.

Marriage equality opponents repeat historical, pseudoscientific assumptions of social welfare and family optimality to justify an exclusionary marital policy. Such opponents denigrate reliance on the "shifting sands of social science" where it suits them, but invite this Court to uncritically accept "scientific" postulates analogous to those discredited in modern legal contexts such as those involving marriage bans across racial lines, laws prohibiting individuals with disabilities from marrying, and the imposition of legal burdens on nonmarital children. Brief for Public Advocate of the United States et al. as *Amici Curiae* Supporting Appellants at 5, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341). This Court should reject them here as well.

CONCLUSION

In the cases of both race-based marital restrictions and the differential treatment of nonmarital children, this Court eventually rejected efforts to defend discriminatory marriage laws and policies based on the supposed pursuit of social welfare and family optimality. Those efforts frequently were grounded in purported "scientific" facts relating to the well-being of society and children. But this Court ultimately saw them for what they were: constitutionally impermissible ways of privileging the rights and interests of some over those of others.

Although class-based marital exclusions have been relatively rare in American history, they usually have shared one characteristic: Proponents of those laws have attempted to justify them by making pseudoscientific claims about how best to maximize social welfare and child well-being. The courts, and the broader society, eventually came to understand that such efforts were constitutionally impermissible, morally unacceptable, and empirically indefensible.

The same likely will be true when the judgment of history regards the pseudoempirical claims made by those who today defend the categorical exclusion of same-sex couples from the institution of marriage based on the alleged need to protect society and children from harm. The troubling ways class-based marital policies and restrictions were defended in the past should make this Court highly skeptical of the effort to deny same-sex couples the opportunity to marry, purportedly to promote the well-being of society and children.

The lesson of the history explored in this brief is that the empirical-sounding, pseudoscientific assertions of jurists and counsel in defending marital bans in one era often are revealed as invidious and indefensible discrimination over time. The decisions below should be reversed.

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